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Proposition 65: How Does It Work?

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(Bill Quirk, Chair)
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Proposition 65 Update ~ Toxic Chemical Exposure: Protecting and Informing the Public

As an Assistant Clinical Professor of Law and founding Director of its Environmental Law Clinic, I submit this written testimony to memorialize oral testimony presented at the Assembly Committee on Environmental Safety and Toxic oversight hearing on August 22, 2017 titled *Proposition 65 Update ~ Toxic Chemical Exposure: Protecting and Informing the Public.*

As a two-decade legal professional with a focus on the regulation of toxic chemicals generally, and deep background in legal issues surrounding California's 1986 Proposition 65 law ("Prop 65") in particular, it's a privilege for me to discuss Prop 65 with the Committee at this juncture.

It is exactly one year after stakeholders finished fighting over the contents of the new warning Prop 65 regulations issued by the Office of Environmental Health Hazard Assessment ("OEHHA"), and it is one year before they begin fighting over their enforcement.[i] This moment of relative peace is therefore a good time to review the basic mechanics of Prop 65, so Committee members have a shared understanding going forward. That's what I will endeavor to explain, in accurate but non-technical terms. It's also the right time to take a bigger-picture look at Prop 65 after thirty years of operation, and ask some fundamental questions.

Such as: *Does the law do what its supporters intended when they drafted it in the 1980s?* And: When we ask if warnings are "effective," or whether there's a way to reduce the "burdens" that Prop 65 places on business, *are we really asking the right questions?* I'll talk about that too.

By way of background: Although I come to you today from my teaching job at Berkeley Law, in discussing Prop 65 my perspective is not primarily that of an academic. Rather, it's as someone who spent many years as a member of the Prop 65 enforcement team at the California Attorney General's office, most recently, working to improve regulations governing the settlement of private-plaintiff Prop 65 lawsuits. I additionally helped to successfully defend OEHHA's 2013 listing of the chemical Bisphenol A ("BPA") as toxic to the female reproductive system.

I also come to today's discussion — like all of you — as a consumer, and as a parent, who daily encounters Prop 65 warnings in the marketplace, and has a variety of reactions to them. Some warnings seem both sinister, and silly: "This parking garage contains a chemical known to the State of California to cause cancer." What should I *do?* Not park here? Others are frustrating because they're so vague: "This product contains chemicals known to the State of California to cause reproductive harm." *Which* chemicals?

Other warnings have been genuinely helpful to me, like the warning advising pregnant and nursing women, and small children, to avoid eating specific fish species because of their high mercury levels. Today, I'll attempt to reconcile all those reactions I experience personally with all that I know about Prop 65 professionally.

And my goal by the end is for you to think that although the law will always need tweaking, in the way OEHHA just has — by issuing very thoughtful regulations to make warnings clearer, more specific, and more useful — the design of Prop 65 is fundamentally sound, and it does much more good than harm by enhancing public health on a large scale. In my view: What Prop 65 has is *no*t a serious substantive problem, but a serious public relations problem.

Its flaws are highly public. Its successes are mostly invisible. And support structures that could reduce businesses' compliance costs, and enforcement costs to the taxpayer, are virtually nonexistent.

So let me now begin the story at the beginning, by telling you what the law requires. Then, I'll offer some thoughts on its operation in practice. And some thoughts on how we could make it function better.

First: How does Prop 65 work? To whom does it apply, and what does it require?
I'll focus on the big picture here. California's voters passed Proposition 65 in 1986 by citizen initiative.[ii] Its official ballot title was the *Safe Drinking Water* and Toxic Enforcement Act (emphasis added), reflecting its drafters' particular concern about prohibiting discharge of toxic chemicals to drinking water. The supporters of Prop 65 also intended to take it geographically big: they expected it to be replicated in other states, and eventually, become federal law.

As we know, Prop 65 never went national. And in thirty years of Prop 65 practice, there has also been very little enforcement activity under the drinking water part of the statute. Instead, the theater of action is the other half of the law: the part requiring businesses — including, but not limited to, manufacturers and retailers and factory owners and service providers — to warn California consumers before "exposing" them to certain toxic chemicals. An art supply store in California might have to provide a warning. A shoe manufacturer in Michigan who sells into California might have a duty to warn. A factory that emits toxic chemicals into the air may have to warn those near its fence-line. A dentist filling a cavity might have to provide a Prop 65 warning to a patient because of the chemicals used in the procedure.

Importantly, Prop 65 doesn't <u>prohibit</u> exposures to toxic chemicals unless drinking water contamination is involved; under the warnings part of the statute, it's simply a right-to-know law that pushes chemical exposure information out into the marketplace.

Which chemicals are we talking about?
The chemicals that businesses must warn about are several hundred chemicals listed by our state's expert toxics agency — the Office of Environmental Health Hazard Assessment, or "OEHHA" — as either cancer-causing, or harmful to the human reproductive system, in that they interfere with fertility, or the ability to produce healthy babies.[iii] Some chemicals are listed for both reasons.[iv]

Prop 65 doesn't cover nearly all of the chemicals that can hurt you. For example, it doesn't cover chemicals that cause neurological damage, or asthma, or skin rashes. It only addresses certain types of health harms caused by toxic chemicals, which is why the legislature has passed additional laws, like the Safer Consumer Products law,[v] addressing other human health harms from toxic chemicals.

So what happens once a chemical is listed?
Once OEHHA puts a chemical on the Prop 65 list, a business must provide a "clear and reasonable" warning that the public might be exposed to it. This means that the content of the warning must be comprehensible (<u>clear</u>), and that it must be transmitted in a way that makes it

reasonably likely the consumer will see it before exposure. So, for example, it can't be in four-point dark yellow font on a light yellow product label. (Manufacturers have tried this sort of thing.)

The warning can be given in a variety of ways. It can be on a product label, but it can also be on, say, a product hang tag, or a shelf where an item is displayed. That last is called a "point of sale" warning. Or, if an environmental exposure to a chemical is at issue, like in a parking lot or a building, a warning might take the form of a sign on the wall.

Until now, many of these warnings have been maddeningly vague, because a 1988 regulation created a so-called "safe harbor" warning that businesses were allowed to use to avoid Prop 65 liability. The language of that warning did not require businesses to identify the specific chemicals triggering the warning, and did not require any type of instructions about how to mitigate exposure. This made many such warnings confusing and often functionally useless, and contributed substantially to political frustration with so-called "over-warning."

That said, it is a bit disingenuous for industry to complain about the safe harbor warning for two reasons. First, the 1988 regulation was the result of a negotiation between business and OEHHA's predecessor agency, in which business interests made clear they did not want to have to go to the trouble of creating customized warnings for specific sources of chemical exposure. Instead, they wanted a uniform shield against litigation, in the form of a very generic warning.

Second, even in the 2015-16 stakeholder process leading up to OEHHA's issuance of its new and nuanced regulation overhauling the warning system, many in industry were resistant to improved, more specific, more consumer-useful warnings, because industry often benefits from generic warnings: consumers ignore them, or grown numb to them. So when we talk about meaningless warnings, and over-warning, it's important to understand that it took a government-business collaboration to get to a result that silly in 1988.

In my view, OEHHA is now doing a great job of fixing the problem and moving us towards meaningful, informative warnings that will help consumers and improve the product marketplace.

Moving on to other important features of Prop 65: **Prop 65 only governs chemicals that could reasonably cause an exposure to someone.** There's a common misconception that simply because something contains a chemical, a warning is required. But that's not true – it's all about the potential for human exposure. So for example, if there is lead in the interior of the baggage compartment beneath an airplane, the airline has no duty to warn passengers about it, because there is no way they are going to touch it or eat it and get exposed.

Additionally, Prop 65 only requires warnings when exposure **presents a certain level of risk,** which is quantified in the statute and regulations.[vi] It's not a zero-risk statute – businesses are not required to warn about exposures to chemicals that pose only miniscule risk. In some cases, OEHHA publishes the exposure levels that trigger a duty to warn.[vii] In other cases, plaintiffs and defendants need to produce their own evidence about what level of exposure would cause the degree of health harm that requires a warning, and that level may be in dispute.

Does a business need to know that a listed chemical is in its product, or on its premises, or being emitted from its facility, and that it's exposing people, to be liable? Yes, and no. The business has to know that it is exposing someone to a particular chemical, but does not have to know that this exposure is illegal, and it does not have to have the intent to harm anyone. This may sound unfair, but it's just like speeding on the highway: if you are going 85 miles per hour in a 65-mile zone, it's not a defense to a ticket that you didn't see the speed limit sign, or that you didn't want to kill anyone. As with Prop 65, you're being penalized for creating a health risk to someone else.

This means that once a chemical is listed, a business has to engage in some level of diligence to determine if it has any reason to warn the public about that chemical. Here, it's important to note that Prop 65 gives businesses **one year from the time of a chemical's listing** to provide a warning. So, although Prop 65 is sometimes perceived as a kind of "gotcha" statute, that criticism is overstated. Particularly for mid-size and larger businesses, trade associations and in-house or retained counsel are typically very active in providing compliance advice about newly listed chemicals. At the other end of the spectrum, Proposition 65 exempts businesses of fewer than 10 employees from the duty to warn.

So, although some small businesses can and do get surprised by Prop 65 suits, many businesses are either exempt because they're so small, or treat Prop 65 compliance as one among many routine regulatory compliance obligations. And for retailers, OEHHA's new warning regulations provide additional relief in cases where retailers did not know their products contain listed chemicals.

If businesses fail to provide the warnings required by Prop 65, they are subject to enforcement lawsuits by the Attorney General, by other public prosecutors such as City Attorneys, and by private plaintiffs.

In suits brought by public enforcers, defendants are liable for civil penalties of *up to* $2,500 per day for each violation, although courts need not assess the maximum. In the case of emissions from a factory, one day might count as one violation. In the case of consumer products, each sale of a product might count as a violation. Penalty monies go to OEHHA. Where a private plaintiff wins a Prop 65 suit, that plaintiff keeps 25% of the penalty, with the remainder to OEHHA. This is what gives rise to the term "bounty hunter."

Although that term is typically used pejoratively, in the view of the Attorney General's office, private enforcers are a valuable and necessary part of the Prop 65 enforcement scheme, because they provide many eyes close to the ground, and supplement the always-insufficient enforcement capacity in resource-strapped public agencies. That view is explicitly expressed in the Statement of Reasons for the Attorney General's recent regulations on private settlements.

There are of course some cases of abuse, and these are well publicized. But there are many more under-told *success* stories, like the private-party actions that reduced diesel emissions from children's school buses, and lead in all of our drinking faucets. These are on top of the public

agency actions that, for example, have successfully reduced lead in nutritional supplements, and reduced diesel air pollution at the ports of Los Angeles and Long Beach.

There are a number of additional features of Prop 65 that are designed to ensure that businesses are not caught by surprise by lawsuits, and that frivolous lawsuits cannot proceed. These mechanisms are imperfect, but they are helping, and they are getting better all the time. For example, in addition to the one-year grace period that I mentioned between when a chemical is listed and a business has an obligation to warn about exposures, **a business can request from OEHHA what is called a "safe use determination,"** which is a finding that it is causing exposures below the level requiring a warning. Such a determination acts as a shield against liability.

Additionally, before a private plaintiff can bring a Prop 65 lawsuit, she or he must provide **60 days' notice** to the alleged violator, and also to the Attorney General and various other public prosecutors, who can choose to displace the private party in litigation. Before filing suit, a plaintiff must also provide the Attorney General with a **Certificate of Merit** presenting expert evidence that the violations alleged have occurred. When I was at the Attorney General's office, there were numerous instances of our office either publicly or confidentially communicating with private plaintiffs to tell them that their proposed suit lacked merit and should not be pursued. These communications would typically result in plaintiffs' abandonment of their litigation plans.

On the back end of litigation, private plaintiffs must provide **notice of proposed settlements** to the Attorney General. Here too, the Attorney General can and does formally or informally object to settlements that confer minimal public value, which acts as another check on abuse. Most recently, the Attorney General's office adopted **new regulations governing private-party settlements,** to ensure that sufficient settlement monies go to OEHHA, or are used for other purposes relevant to Prop 65, rather than being used for unrelated purposes of plaintiffs.

So those are the basics of how Prop 65 works. Is it perfect? Far from it. But it has accomplished an awful lot. **Just thinking through what my own evening might look like after this hearing:**

I'll go home and set the table with ceramic plates that used to, but thanks to Prop 65 now likely won't, contain lead. I'll probably pour some wine from a bottle that, prior to Prop 65, had lead in the foil seal, but that because of Prop 65, doesn't anymore. If I were to pour my wine into crystal glasses, those too would likely be lead-free, thanks to Prop 65.

Turning to food: If I were tired and made my family food from a can, I'd know that can manufacturers were now scrambling to get the BPA out of the lining due to its Prop 65 listing, and soon, that source of exposure to a reproductive system toxicant would likely be gone.

When my kids were younger, after dinner I would empty their lunch boxes . . . which would likely not have lead in their linings anymore, due to manufacturers' Prop 65 liability fears. Perhaps I'd play kitchen with my kids, using their plastic toy foods, which have in some cases been reformulated to reduce the levels of phthalates — toxic plasticizers listed under Prop 65 — due to the threat of litigation.

Perhaps I'd then help my kids get changed for bed. In the process, I'd remove their cheap costume jewelry that, but for Prop 65 enforcement, might still contain heavy metals like cadmium and lead, that are toxic at very low exposure levels.

Simply put, **Prop 65 has induced reformulation of literally thousands of products to make them safer,** because manufacturers want to avoid having to warn the public that they are toxic. This is how the statute is <u>supposed</u> to work: not by plastering our state with warnings, but rather, by encouraging safer chemical substitutions or product redesign.

Unfortunately, this typically occurs quietly and invisibly, and makes nothing like the political impression of the warnings we daily encounter . . . which is why I say that Prop 65 has a public relations problem.

And the public relations problem does not stop with the issue of product-specific chemical substitutions, because **I haven't even mentioned Prop 65's biggest hidden successes.** These lie in exposing to public view huge areas of under-regulation of toxic exposures, because Prop 65 has given California an army of toxics cops that other states and the federal government typically lack.

Thus, for example, when I learned some years ago that **hair salon workers in California were getting asthma attacks and bloody noses, and in some cases becoming permanently occupationally disabled,** because of their exposure to the startling levels of formaldehyde in performing hair treatments with the popular straightening product called "Brazilian Blowout," I was able to bring a high-profile lawsuit against the manufacturer, in which a Prop 65 claim was central. Formaldehyde is listed as a known carcinogen under Prop 65, and OEHHA has established a risk threshold for inhalation exposure that the Brazilian Blowout product exceeded.

Prop 65 filled a huge enforcement gap, because the federal FDA was doing almost nothing about the problem of salon worker exposure to formaldehyde under our very weak federal cosmetics statute (the Federal Food, Drug and Cosmetic Act), whose relevant title was written in 1938.

The Attorney General's lawsuit over Brazilian Blowout helped prompt Congress to hold its first oversight hearing on cosmetic safety in 30 years. That, in turn, lead to crafting of a now-pending bipartisan bill by Senators Dianne Feinstein and Susan Collins to overhaul federal cosmetic safety regulation. This is an example of the huge, if indirect, impact of Prop 65: because the statute encompasses such a large number of chemicals, in so many applications, and is so flexible, it can both fill gaps left by narrower laws, and push large-scale reforms to our many outdated toxics-control laws at the state and federal levels.

A related consideration is this. **The Prop 65 private plaintiffs' bar in California is now sufficiently powerful that it acts as a protector of California's interest in guarding the health of its citizens when the federal government is indifferent,** or, in the Trump Administration case, overtly hostile to the task. Two decades ago, the Prop 65 plaintiff's bar advocated successfully at the federal level to avoid preemption of California toxics law by revisions to the Food, Drug and Cosmetic Act, and just last year, to avoid preemption by revisions to the Toxic Substances Control Act.

What this means is that when the Trump Administration not only fails to take aggressive action to address toxics exposures under those federal laws, but uses the laws' strong preemption provisions to elbow the states out as well, California — and in some cases, California alone — will still be able to protect its residents from toxic exposures. This, too, is a Prop 65 success story: retaining California's political authority to protect the health of its residents.

Are there ways we could make Prop 65 more effective in achieving its *primary purpose* of protecting public health, while *also* lowering compliance costs for business, and additionally, the public enforcement costs that get passed on to taxpayers? Absolutely. As an example: OEHHA is significantly increasing and improving the compliance assistance it provides to small businesses, which helps in all of those ways.

But there is something even more profound we can do, and it's a place where the California Legislature can lead.

Simply put: One of the biggest reasons Prop 65 is difficult and expensive to comply with, and also to enforce, is that supply chain information about consumer products is terrible, and this is the arena in which most litigation arises. Retailers and distributors generally have little idea what's in the products they sell, and can't readily find out, leading to justifiable frustration. Prop 65 is not the cause of this situation – it's simply the messenger that gets blamed.

Public and private enforcers have even fewer means of finding out the composition of products, so they aim their fire at the few chemicals that are easiest to test for. This means in turn that some product categories get unduly hammered, and others that surely contain Prop 65 chemicals that we should be concerned about get off scot free.

One of the first, critical steps the legislature can take to remedy this situation is to enact more legislation to force product ingredient disclosure. A perfect example is California Senate Bill 258, a cleaning product ingredient disclosure bill now pending.[viii] Forcing more information through consumer product supply chains helps reduce compliance costs and unfair surprise to retailers in particular, by taking the guesswork out of Prop 65 compliance. And it helps enforcers by lowering product testing costs, which in turn lets them set priorities that maximize public health protection. Forcing ingredient information into the open is, additionally, a fundamentally upright capitalist thing to do, because as Adam Smith long ago observed, imperfect information — which includes, asymmetry of information between producers and consumers — impedes the proper functioning of markets.

Most important, disclosure **sends market signals that will help encourage safer product formulation in the first instance**. And this would drastically decrease an exposure we'd all like to reduce: Our exposure to Prop 65 warnings.

So, Prop 65 is in many ways and odd statute. The law emphatically does not operate as its supporters imagined. It has not been replicated as envisioned. Instead, California stands as a regulatory island. And Prop 65 has not been used primarily for drinking-water protection, as its proponents intended and expected.

And yet: Prop 65 is profoundly important, such that we should be proud of rather than defensive about it. With respect to warnings in particular, when we ask whether they are "effective" — by which we tend to mean, whether they influence individual consumer behavior — we are not really asking the right question. Warnings are instead mostly "effective" in invisible ways: by forcing reformulation behind the scenes, so that companies can avoid the duty to warn. Or, they are "effective" because the failure to warn prompts enforcement actions that lead to product changes. Or, they are "effective" because the existence of a warning calls a new hazard to regulators' attention, and they enact new and better laws to protect us from that hazard.

To the extent that there are economic "burdens" of Prop 65 compliance — and there surely are — they are largely the burdens imposed by poorly regulated supply chains, not by Prop 65 itself. Thus, by pushing more ingredient information into the marketplace, ingredient disclosure laws can create support structures that greatly reduce Prop 65 compliance and enforcement costs.

I would welcome the opportunity to work with the legislature on that project, to improve the health of Californians in the most cost-effective ways.

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[i] The regulations regarding "Clear & Reasonable Warnings" comprise the (new) Article 6 in Title 27 of the California Code of Regulations. They were adopted on August 30, 2016, and will be operative August 30, 2018.

[ii] Proposition 65 by its terms provides that the Legislature can only amend it "to further its purposes," and by a 2/3 vote. (Initiative Statute, § 7.) Proposition 65 is codified in the Health and Safety Code. Both OEHHA and the California Attorney General have issued regulations pursuant to the statute.

[iii] Proposition 65 has multiple, alternative mechanisms by which a chemical can be added to the list of chemicals "known to the state" to cause cancer or reproductive harm. The state can rely on the views of certain of its own "qualified experts"; on the views of certain other "authoritative bodies" with toxicological expertise; on the fact that particular chemicals have been identified in specified sections of the Labor Code because of the occupational risk they may pose; or because another government body has "formally required" that they carry a warning about cancer or reproductive toxicity. These requirements, which are disjunctive (*i.e.,* a chemical need only meet one to require listing), have been established through a combination of statutory text, regulation, and judicial interpretation.

[iv] For this dual-listing reason, the number of chemical entries on the Prop 65 list is significantly longer than the list of individual chemicals to which the law applies. Prop 65 defendants tend to quote the former number to make the law sound pervasive and burdensome; Prop 65 plaintiffs and regulators tend to quote the latter number because it makes the law sound less intrusive.

[v] Assembly Bill 1879 and Senate Bill 509 (both enacted 2008) are the twin bills establishing what is generally called the "Green Chemistry" and/or "Safer Consumer Products" program in California, although neither has that formal bill title. These bills give the Department of Toxic Substances Control and OEHHA, respectively, primary responsibility for this program.

[vi] For carcinogens, the level of risk requiring a warning is 1 in 100,000 cancer cases assuming a lifetime exposure to a chemical at the level in question (27 Cal. Code Regs. § 25703(b); for reproductive toxicants, the risk level triggering warning is one one-thousandths of the level at which exposure to a chemical causes no observable effects (Health & Saf. Code § 25249.10(c).)

[vii] The regulatory line defining whether there is or is not a duty to warn about exposures is referred to as the "No Significant Risk Level" (NSRL) for carcinogens, and the "Maximum Allowable Dose Level" (MADL)) for reproductive toxicants. Chemicals causing exposure above the NSRL or MADL trigger the legal duty to warn.

[viii] This bill was introduced on February 8, 2017. It is titled the "Cleaning Product Right to Know Act of 2017."